

**LETTER OPINION**  
**95-L-76**

March 22, 1995

The Honorable Ruth Holm  
District 21 - State Representative  
State Capitol  
600 East Boulevard  
Bismarck, ND 58505-0360

Dear Representative Holm:

Thank you for your letter requesting an opinion on whether an adult child could be charged with a class C felony by complying with a parent's wishes to remain at home rather than move to a nursing home.

Before responding directly to your question, it is necessary to first review the current law and the changes proposed by Senate Bill No. 2087.

N.D.C.C. § 12.1-31-07, as adopted by the 1993 Legislative Assembly, provides that a "caregiver" of an "elderly adult" who (1) knowingly performs an act that causes an elderly adult's life to be endangered, health to be injured, or preexisting physical or mental condition to deteriorate or (2) fails to perform acts the caregiver knows are necessary to maintain or preserve the life or health of an elderly adult and the failure causes the elderly adult's life to be endangered, health to be injured, or preexisting physical or mental condition to deteriorate is guilty of a class A misdemeanor. N.D.C.C. § 12.1-31-07.

Under the current statute, a caregiver is defined as a person who is responsible for the care of an elderly adult by having assumed the care or as a result of a family or legal relationship. N.D.C.C. § 12.1-31-07(1)(a). An elderly adult is defined as a person sixty years or older who suffers from a disease or infirmity associated with advanced age and who is

The Honorable Ruth Holm  
March 22, 1995  
Page 2

therefore incapable of adequately providing for his or her own health or personal care. N.D.C.C. § 12.1-31-07(1)(b).

Engrossed Senate Bill No. 2087 amends N.D.C.C. § 12.1-37-07 to replace the term "elderly adult" with the term "vulnerable elderly adult". The definition of vulnerable elderly adult remains the same as the prior definition for elderly adult. The definition of the term caregiver is amended to exclude licensed health care providers from whom the vulnerable elderly adult is receiving services. The engrossed bill also changes the offense from a class A misdemeanor to a class C felony.

The House proposed amendments remove from the bill the exclusion for licensed health care providers.

N.D.C.C. § 12.1-02-02(3)(b) provides that if conduct is an offense if it causes a particular result, the required degree of culpability is required with respect to the result. A person is responsible for a crime under N.D.C.C. § 12.1-31-07 if the person acts knowingly. A person acts knowingly if the person acts with a firm belief, unaccompanied by substantial doubt, whether or not it is the person's purpose to do so. N.D.C.C. § 12.1-02-02(1)(b). Applying these provisions to N.D.C.C. § 12.1-31-07 if Senate Bill No. 2087 passes, a family member or other person who has assumed the responsibility for the care of a person sixty years of age or older who is incapable of adequately providing for his or her own care due to an age related disease or infirmity, who knowingly performs an act which causes the elderly adult's life to be endangered, health to be injured or preexisting condition to deteriorate would violate the statute and be guilty of a class C felony. Likewise, a family member or other person who has assumed the responsibility for the care of a person sixty years of age or older who is incapable of adequately providing for his or her own care due to an age related disease or infirmity, who knowingly fails to perform acts which the person knows are necessary to maintain or preserve the life or health of the elderly adult and the failure causes the elderly adult's life to be endangered, health to be injured or preexisting condition to deteriorate would violate the statute and be guilty of a class C felony.

The Honorable Ruth Holm  
March 22, 1995  
Page 3

The fact that the caregiver was acting under a durable power of attorney, a durable power of attorney for health care, or following the express wishes of the vulnerable elderly adult or acting in the vulnerable elderly adult's best interests pursuant to a living will would be a defense to the crime. N.D.C.C. § 12.1-31-07(2) penalizes action or failure to act that causes an elderly adult's life to be endangered, health to be injured, or physical or mental condition to deteriorate "[e]xcept as provided for by chapters 23-06.4 (pertaining to living wills), 23-06.5 (pertaining to durable powers of attorney for health care), and 30.1-30 (pertaining to durable powers of attorney)." It may be advisable to expand the exceptions to cover N.D.C.C. § 23-12-13 which authorizes certain persons to provide informed consent to health care on behalf of an incapacitated person. Except under these specific conditions, the fact that the caregiver is following the express wishes of the vulnerable elderly adult does not appear to be a defense under N.D.C.C. § 12.1-31-07.

Other defenses available under N.D.C.C. § 12.1-31-07 would be limited to arguments that the person charged with the crime was not within the definition of caretaker under the statute, that the elderly adult did not fit within the definition of a vulnerable elderly adult under the statute, that the action taken was not done knowingly, that the person charged did not know the act he failed to take was necessary to maintain or preserve the life or health of the elderly adult, or that action taken or which he failed to take did not cause the elderly adult's life to be endangered, health to be injured or preexisting physical or mental condition to deteriorate.

It should be noted that no person may be convicted of any crime unless each element of the offense is proved beyond a reasonable doubt. N.D.C.C. § 12.1-01-03. Therefore, if there is any reasonable doubt that the person knew the action or failure to act would cause the elderly adult's life to be endangered, health to be injured or preexisting condition to deteriorate, the person could not be convicted under N.D.C.C. § 12.1-31-07.

Applying N.D.C.C. § 12.1-31-07 to the specific factual situation you raise, it is my opinion that under certain conceivable circumstances an adult child could be convicted of

The Honorable Ruth Holm  
March 22, 1995  
Page 4

a class C felony if Senate Bill 2087 passes for complying with a parent's wishes to remain at home rather than move to a nursing home. To avoid this result, the bill could be amended to provide that it is a defense to any charge under the statute that the caregiver was following the express wishes of the vulnerable elderly adult regarding living arrangements or health care decisions.

Sincerely,

Heidi Heitkamp  
ATTORNEY GENERAL

bab/vkk